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THE MERGER CASE AND RESTRAINT OF TRADE.

AT least three distinct questions appear to be raised by the Northern Securities case:[1]

1. Do the facts disclose anything amounting to a misdemeanor under the Sherman Anti-Trust Act?[2]

2. If so, was the procedure appropriate?

3. If both the foregoing questions are to be answered in the affirmative, was the decree made by the United States Circuit Court the proper decree?

The second and third questions can be discussed with profit only by persons well acquainted with the equity practice of the federal courts; for although the jurisdiction exercised and the remedy applied in this case are wholly statutory, the statute must obviously be read in the light of the existing practice. The first question involves considerations (among others) of general common law on which it may not be presumptuous for an English lawyer, at the request of the Editor of the HARVARD LAW REVIEW, to say a few words.

At common law the fact that an agreement is void as being in restraint of trade does not, without more, make it unlawful — that is to say, an indictable offense or an actionable wrong — either to enter into such an agreement or, if one thinks fit, to observe it.

[1] United States *v.* Northern Securities Co., 120 Fed. Rep. 721.

[2] 26 Statutes at Large, c. 647, p. 209.

In England, at any rate, this was finally settled by the decision of the House of Lords in the Mogul Steamship Co.'s case.[1] But, by the Sherman Anti-Trust Act, it is a misdemeanor in the United States to make a contract (or otherwise combine or conspire) in restraint of trade or commerce among the several states.[2] I do not find any words making the execution of any such contract a substantive offense, though it might be held to be a "violation of this Act" within Section 4,[3] and therefore fit to be restrained under the special jurisdiction created by that section. The offense is in the nature of conspiracy, whether actually described as conspiracy or not. Execution is only an overt act which may be material as evidence.

The mere fact of one corporation owning a majority of the shares in one or more other corporations does not seem to have anything to do with the common law doctrine of restraint of trade. And the fact, if such it be, that this prevents competition does not appear to carry the matter further. A contract to buy out a competing business with its goodwill has never, in modern times, been treated as necessarily bad. In one sense, indeed, it is the object of every competitor to prevent competition, and he does so just so far as he succeeds. An undertaking by one corporation not to compete with another in any business including interstate commerce would, on the other hand, be an offense against the Act, subject to the question how far, if at all, the Act embodies by implication the exception of agreements which would be valid at

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[1] Mogul Steamship Co. *v.* McGregor, 23 Q. B. D. 598.

[2] Section 1 declares that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

[3] "SEC. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

common law as being made for valuable consideration, and not going beyond the reasonable protection of the interest to be protected. But in this case no corporation has entered into any such undertaking.

The matter, however, is far from resting here. For it appears that the controlling corporation was created in fact, if not on the face of its charter, for the very purpose of acquiring control of the other two; that it was formed by members of those others, and that it has substantially no other members of its own. Corporations which are going to deal in affairs of that scale are not formed by casual meetings in the street or even in an office. I assume, therefore, that the Northern Securities Company was formed in pursuance of an agreement, and that all or most of the parties thereto were shareholders in the Northern Pacific or Great Northern railway. Was that agreement an agreement in restraint of trade?

An agreement between two or more firms to appoint a joint committee and conduct their business, wholly or in any material part, according to its directions, is in restraint of trade, and will not be enforced.[1] There seems to be no lack of recent American decisions to the same effect.

It obviously makes no difference in point of law whether the parties to such an agreement be natural persons acting singly, or groups of persons acting as firms, or corporations, or a mixture of all or some of these.

A corporation is a person distinct from its individual members. But it does not follow that the business of a trading corporation is not the business of its members. It is so much their business that they have, in many respects, rights analogous to those of partners, as we know from a long line of decisions in courts of equity. An agreement whereby one or more shareholders — not to say a majority of the shareholders — in a company renounce or fetter their rights of exercising an independent judgment in the company's affairs would seem, on the face of it, to be an agreement in restraint of trade.

This is not, in form, the present case. Here the shareholders in question agreed to transfer, and did transfer, their shares to the new company, and to take, as they did take, the consideration in its shares. They receive, or but for the decree under appeal would receive, dividends on these last-mentioned shares, and not

[1] Hilton *v.* Eckersley, 6 E. & B. 47.

on the railway shares which they have transferred. If the transaction were a real out-and-out sale, it is difficult to see what fault could be found with it on the point of restraint of trade, which alone concerns us. But has there been a genuine sale? Will the court not see any ground for going behind the form? The Northern Securities Company has, I understand, no property and no funds out of which to pay dividends other than the very railway shares which have been transferred to it; nor does it seek to distribute profits to any persons other than those transferors. And, if this is so, may it not be held that the transaction, as a sale, is merely colorable, and that in truth it is a device to the effect of enabling the transferors to retain their beneficial interest in the several railway companies while each of them renounces his individual voice and vote as a shareholder? And if that be the correct view of the facts, is not the agreement which leads to such results equivalent to an agreement between several persons engaged in business to surrender their discretion as to the manner in which they shall conduct their business? In other words, is it not an agreement in restraint of trade within the authority of Hilton *v.* Eckersley and the recent decision of the Supreme Court of the United States in the Addyston Pipe and Steel Co.'s case?[1]

In the event of an affirmative answer to the question last put, it still has to be considered whether the restraint imposed is a restraint on trade among the several states. This is a matter of specially American constitutional law, on which I do not venture to offer any opinion.

These, it is submitted, are some of the points of substance which the Supreme Court of the United States now has to determine. It would be interesting to know what view the courts of New Jersey would take, in properly constituted proceedings in the nature of *scire facias* or otherwise, of the validity of the charter granted to the Northern Securities Company; but nothing now before me shows whether any such question has arisen or is likely to arise.

As to the second section[2] of the Sherman Anti-Trust Act, its

[1] Addyston Pipe and Steel Co. *v.* U. S., 175 U. S. 211.

[2] "SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

words are very large, and I confess that I do not know what kinds of acts it was intended to include. Possibly it is aimed at such acts as those which were held in the Mogul Steamship Co.'s case not to be criminal or wrongful at common law. But I do not see, as at present advised, and on the materials before me, by what reasonable construction the facts of the present case can be brought within it.

I am not acquainted with the reasons given by the United States Circuit Court of Appeals in the present case, except as appears from the extracts in Mr. Thorndike's pamphlet.[1] Assuming his statement to be adequate, I submit, agreeing with him so far, that the decision cannot be supported on the grounds assigned. The line of argument above suggested is independent of those grounds.

Frederick Pollock.

R. M. S. ETRURIA, November, 1903.

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[1] The Decision in the Merger Case, by J. L. Thorndike. Boston: Little, Brown & Co.

This pamphlet, and the review of it by Professor Langdell in 17 HARV. L. REV. 41, suggested the present article. — ED.